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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

RICHARD E. WILMSHURST and 49ER CHEVROLET,
Appellants,

VS.

NEW MOTOR VEHICLE BOARD, et al,
Appellees.

On Appeal from the
Court of Appeal of the State of California,
Third Appellate District

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. The State of California violates the First Amendment rights of a franchisee when it establishes, as good cause for non-continuance by the franchisor of the franchise agreement, a letter sent to the United States Senate Commerce Committee at the request of the Committee; communication with the Special Assistant Attorney General of the State of Rhode Island and with the Department of Consumer Affairs of the State of California suggesting that present General Motors warranty practices may violate the law.

Franchisees are entitled to petition the government for redress of their grievances without fear of retaliation by powerful franchisors assisted by state government.

II. The State of California adopted the "good cause" standard of restricting a franchisee's expression of wrongdoing of the franchisor tendered by General Motors and assisted General Motors in later court review by filing briefs arguing against the First Amendment rights of 49er Chevrolet.

III. The State of California violates the First Amendment rights of a franchisee when it establishes as "good cause" for non-continuance of the franchise agreement by the franchisor the "pure speech" expression of a franchisee directed to the franchisor through letters and quiet discussion of the franchisee's belief that the franchisor's policies and procedures are unfair as applied to the franchisee and, possibly, unlawful and in violation of state and federal laws.

IV. General Motors' second termination letter in 1981, adding a reduction in Chevrolet passenger car sales as a second reason for non-renewal of 49er Chevrolet's franchise agreement, was an effort to cloud General Motors' real reason for non-renewal: That of objecting to 49er Chevrolet's First Amendment rights, the only reason for non-renewal in 1979.

PARTIES

Richard E. Wilmshurst, 49er Chevrolet, New Motor Vehicle Board of the State of California, Chevrolet Motor Division of the General Motors Corporation.

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VS.

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Appellees.

On Appeal from the
Court of Appeal of the State of California,
Third Appellate District

JURISDICTIONAL STATEMENT

Appellants, Richard E. Wilmshurst and 49er Chevrolet, Inc., appeal from the decision of the Court of Appeal, Third Appellate District, of the State of California, filed on March 4, 1985, upholding the decision of the California New Motor Vehicle Board and the review by the Calaveras County Superior Court holding that under Section 3061 of the California Vehicle Code (California Automobile Franchise Act) the New Motor Vehicle Board's decision did not violate appellant's First Amendment rights to redress his grievances to the government and speak freely on issues of public importance. The within statement is submitted to demonstrate that this Honorable Court possesses jurisdiction over this appeal and the substantiability of the federal questions herein presented warrants immediate consideration and disposition by the Court.

OPINION BELOW

The opinion of the Court of Appeal, Third Appellate District, State of California, filed on March 4, 1985, in Civil Action No. 3 Civil 23426, has not been reported and is annexed hereto as "Appendix A."

JURISDICTION

The action below was commenced in the Calaveras County Superior Court by a petition for writ of administrative mandamus filed on January 5, 1982 to review the decision of the California New Motor Vehicle Board denying the protest of 49er Chevrolet, Inc. pursuant to California Vehicle Code Sections 3060, et seq.

The Statement of Decision of the Honorable Richard E. Tuttle and judgment sustaining the action of the New Motor Vehicle Board was filed on September 19, 1983.

Appeal was taken to the Court of Appeal, Third Appellate District, State of California on October 17, 1983 and the decision sustaining the California New Motor Vehicle Board and the Calaveras County Superior Court was filed on March 4, 1985. A petition for hearing was filed in the California Supreme Court and was denied on May 15, 1985.

Notices of appeal were filed in the Court of Appeal on July 15, 1985 and in the Calaveras County Superior Court on July 17, 1985. Copies of the Hearing denial by the California Supreme Court and the notices of appeal to the Court of Appeal, Third Appellate District, and the Calaveras County Superior Court were lodged with this Court on July 18, 1985 with an Application for Extension of Time to Docket Appeal.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. 1257(2), authorizing appeal to the United States Supreme Court when the validity of a state statute is drawn in question as being applied in violation of First Amendment rights and the decision by the State of California was for its validity. *Cohen v. California* (1971) 403 U.S. 15, 91 S.Ct. 1780.

STATUTES INVOLVED

The California Automobile Franchise Act, wherein a vehicle franchisor may not terminate or refuse to continue a franchise agreement unless "good cause" standards are met as established by the California Legislature. These sections of the California Vehicle Code are set forth in "Appendix B."

PRELIMINARY STATEMENT AND SUMMARY OF THE CASE

The State of California has regulated the termination and non-renewal of new vehicle dealers' franchise agreements since 1973.[1]

This exercise of California's police power was declared by the Legislature for the purpose *"to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor* and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (Emphasis added.)

The 1973 legislation, commonly known as the California Automobile Franchise Act, or "the Act," created numerous new requirements affecting the termination and non-renewal of existing franchises. Most important to the instant case are the "good cause" standards established by the Legislature and applied to the

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[1] 1973 Legislation. Sections 1, 38, 39, of Stats.1973 c.996, p. 1964 provided:

> "Section 1. The Legislature finds and declares that the distribution and sale of new motor vehicles in the State of California vitally affects the general economy of the state and the public welfare and in the exercise of its police power, it is necessary to regulate and to license vehicle dealers, manufacturers, manufacturer branches, distributors, distributor branches, and representatives of vehicle manufacturers and distributors doing business in California in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally."

review of the termination or non-renewal of a dealer franchise by the New Motor Vehicle Board or "Board."

Under the Act, the franchisor is required to give notice to the franchisee and the Board setting forth the specific grounds for termination or refusal to continue the franchise. The franchisee may file a protest with the Board within specific time restraints that automatically stays the termination or non-renewal of the franchise until a "good cause" hearing has been held. In the protest hearing, the franchisor shall have the burden of proof to establish there is "good cause" to terminate or not continue the franchise agreement. (Cal. Veh. Code § 3060-§ 3066)

The elements of proof which the defending franchisor must establish are identified in California Vehicle Code Section 3061 which provides:

> In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:[2]
>
> (1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.
>
> (2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.
>
> (3) Permanency of the investment.
>
> (4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.
>
> (5) Whether the franchise has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel for the motor vehicles handled by the franchise and has been and is rendering adequate services to the public.
>
> (6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

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[2] Amended by Stats. 1983, c.142, p. , § 161 as follows:
"..., but not limited to, *all of the following:*

(7) Extent of franchisee's failure to comply with the terms of the franchise.

The decision of the Board must be in writing and must contain findings of fact and determinations of the issues presented. Except under specified circumstances, the Board must act within 30 days after either the hearing or the date the Board receives the hearing officer's proposed decision, as the case may be. If the Board does not act within the requisite time, the proposed action of the franchisor is deemed approved. (Cal. Veh. Code § 3067)

General Motors Corporation or "GM" is a franchisor and 49er Chevrolet, Inc. and Richard E. Wilmshurst or "49er" is a dealer or franchisee under the Act.

On April 18, 1980, 49er filed a protest with the Board when GM notified it there would be a non-continuance of the franchise agreement. The basis of the GM decision not to continue the franchise relationship was based upon the expression of 49er that some of GM's policies and procedures were illegal. (Appendix F)

The hearing officer sustained the protest and the Board adopted the decision. GM appealed the Board's decision based upon the makeup of the Board. The Superior Court reversed, finding that the makeup of the Board was unconstitutional when the dealer members participated in the deliberation even though they did not vote when dealer issues were involved. The Court of Appeal, First Appellate District, sustained the reversal, the California Supreme Court denied a hearing and this Court denied certiorari.[3]

On September 18, 1981, 49er was notified the second time that GM did not want to continue the franchise relationship. The second notice established 49er's expression of GM's alleged wrongdoing, the decline of new passenger car sales since the last hearing, and dualling with Subaru, a Japanese vehicle as GM's basis for non-continuance of the franchise.

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[3] *Chevrolet Motor Div., General Motors Corp. v. New Motor Vehicle Board* (App. 1 Dist. 1983) 146 C.A.3d 533, 194 C.R. 270, certiorari denied ____ U.S. ____, 104 S.Ct. 1597, 1598.

The second decision found that 49er's expression was not justified and that 49er's new Chevrolet passenger car sales did not meet the Chevrolet sales available to 49er.

The Calaveras County Superior Court, on review, upheld the decision of the Board. On appeal, the Court of Appeal, Third Appellate District, affirmed the decision of the Board and Calaveras County Superior Court.

THE QUESTIONS BEFORE THE COURT ARE SUBSTANTIAL

I

THE STATE OF CALIFORNIA VIOLATES THE FIRST AMENDMENT RIGHTS OF A FRANCHISEE WHEN IT ESTABLISHES, AS GOOD CAUSE FOR NON-CONTINUANCE OF THE FRANCHISE AGREEMENT BY THE FRANCHISOR, A LETTER SENT TO THE UNITED STATES SENATE COMMERCE COMMITTEE AT THE REQUEST OF THE COMMITTEE; COMMUNICATION WITH THE SPECIAL ASSISTANT ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND AND WITH THE DEPARTMENT OF CONSUMER AFFAIRS OF THE STATE OF CALIFORNIA SUGGESTING THAT PRESENT GM WARRANTY PRACTICES MAY BE IN VIOLATION OF THE LAW.

FRANCHISEES ARE ENTITLED TO PETITION THE GOVERNMENT FOR REDRESS OF THEIR GRIEVANCES WITHOUT FEAR OF RETALIATION BY POWERFUL FRANCHISORS ASSISTED BY STATE GOVERNMENT.

Chief Justice Burger, when delivering the opinion of the Court in *McDonald v. Smith* (1985) ____ U.S. ____, 105 S.Ct. 2787 set forth:

> "The First Amendment guarantees the right of the people . . . to petition the Government for a redress of grievances. The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruik-*

> *shank*, 2 Otto 542, 92 U.S. 542, 23 L.Ed. 588 (1876), the Court declared this right is implicit in [t]he very idea of government, republican in form. Id., 552. And James Madison made clear in congressional debate on the proposed amendment that people may communicate their will through direct petitions to the legislature and government officials. 1 Annuals of Congress 738 (1789)"

In 1978 the United States Senate Commerce Commission was investigating the manner in which major automobile manufacturers were handling new vehicle warranty with their dealers and consumers. At the invitation of the Committee 49er sent its comments. These comments alleged that GM participated in parts and labor price fixing in violation of state and federal laws. (Appendix D)

On October 23, 1979, the very next year, R. E. Cook, General Sales Manager of Chevrolet and Vice President of GM, sent 49er a letter of non-renewal specifically stating:

> "During the past several years, you have repeatedly impugned the honesty, integrity and business practices and ethics of the Chevrolet organization, to the extent of accusing Chevrolet of knowingly flouting state and federal laws.
>
> . . .
>
> For these reasons, Chevrolet Motor Division will not enter into a new Dealer Sales and Service Agreement with 49er Chevrolet following the expiration of the current Agreement." (Appendix F)

49er believed GM was violating the law in the manner in which it administered its warranty programs and expressed this belief to a U.S. Senate Committee. GM specifically states that this expression is the reason to terminate a franchise relationship that has been in existence over 45 years.

One of 49er's points of concern was the fact that GM establishes a lower warranty rate it pays the dealer rather than the rate charged retail consumers. In 1977, 49er provided information to the Special Assistant Attorney General of the State of Rhode

Island to assist in a suit regarding warranty rate price fixing. (Appendix C)

The Rhode Island litigation was the impetus that brought about change. In 1978 all major automobile manufacturers agreed to pay dealers at their current retail labor rate.

In May of 1978 49er participated in a public hearing before the State of California Consumer Affairs. 49er suggested to the Consumer Affairs Division that GM might be in violation of state law in applying its warranty policy in California. (Appendix E)

The participation by 49er in this process is at the essence of our governmental system. In *McDonald,* supra, this Court stated: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government", citing *Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75, 85 S.Ct. 209, 216.

It may be true 49er's expression may have challenged GM's policies, however, GM should have defended its position with speech rather than retaliation against a dealer who is participating in the basic function of a democratic society.

II

THE STATE OF CALIFORNIA ADOPTED THE "GOOD CAUSE" STANDARD OF RESTRICTING A FRANCHISEE'S EXPRESSION OF WRONGDOING BY THE FRANCHISOR, TENDERED BY GM, AND ASSISTED GM IN LATER COURT REVIEW BY FILING BRIEFS ARGUING AGAINST THE FIRST AMENDMENT RIGHTS OF 49ER

The California Legislature, when promulgating Vehicle Code Section 3061, does not establish as "good cause" for the non-renewal or termination of a franchise the expression of the franchisee relating to the wrongdoing of the franchisor. It was necessary for the Board to draft a "good cause" standard based upon free expression at the request of GM.

The "good cause" standard accepted by the Board, as requested by GM, became state action when it was used as a standard to

allow the non-renewal of the 49er franchise. At this point, the State removed itself from the required neutral position with regard to protected speech.

The State's involvement became even more pronounced and in violation of 49er's First Amendment Rights when the Attorney General of the State of California filed briefs in the Superior Court and Court of Appeal, supporting the (good cause) standard requested by GM.

In the Court of Appeal, the Attorney General closed the argument on 49er's First Amendment rights as follows:

> "This court should affirm the finding of the trial court, and hold that appellant's exercise of first amendment rights were not the basis of the Board's decision, and were in no way violated." (P.9)

There is no way one could measure the impact of the Attorney General of the State of California participating in the briefing of this action before the Court of Appeal. The state's participation in this proceeding on the side of GM could have been the deciding factor in the lower court's decision.

III

THE STATE OF CALIFORNIA VIOLATES THE FIRST AMENDMENT RIGHTS OF A FRANCHISEE WHEN IT ESTABLISHES AS "GOOD CAUSE" FOR NON-CONTINUANCE OF THE FRANCHISE AGREEMENT BY THE FRANCHISOR THE "PURE SPEECH" EXPRESSION OF A FRANCHISEE DIRECTED TO THE FRANCHISOR THROUGH LETTERS AND QUIET DISCUSSION OF THE FRANCHISEE'S BELIEF THAT THE FRANCHISOR'S POLICIES AND PROCEDURES ARE UNFAIR AS APPLIED TO THE FRANCHISEE AND POSSIBLY UNLAWFUL AND IN VIOLATION OF STATE AND FEDERAL LAWS

In 1978, 49er sent a certified letter to Mr. Murphy, Chairman of the Board of GM, advising him that GM policies were unfair and in violation of criminal anti-trust laws. (Appendix D, p. 34)

The court below cites several letters sent in 1978 (the same year 49er contacted the U.S. Senate Committee and the California Consumer Affairs) advising Chevrolet personnel that it was felt that some of GM's practices were in violation of the law and possibly criminal in nature. (Appendix A, p. 12-19)[4]

Each letter to GM set forth a policy that brought about an unfair or unlawful result in the franchise relationship. Expression of this type, although not directed to government, is protected by the First Amendment.

In the dissent in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) ____ U.S. ____, 105 S.Ct. 2939, the standards of commercial speech were set forth:

> "In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience. (Citations omitted.) [O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, 231-232, 97 S.Ct. 1782, 1797-1798.

The court below admits that 49er contends the franchise termination by GM contravenes 49er's First Amendment right to free speech, applied to the states through the Fourteenth Amendment.

The court stated:

> "Whatever role Wilmshurst's lawsuits and public statements may have had in Chevrolet's decision to end its relationship with 49er, it is clear the decision was premised *primarily*

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[4] The Board in the second hearing took judicial notice of the record of the first hearing as did the Superior Court. The same evidence that originally supported a finding in 49er's favor is now presented to support an adverse decision.

> upon Wilmshurst's continuous campaign of personal insults and attacks against Chevrolet's employees.
>
> . . .
>
> "If all Wilmshurst had done was file lawsuits and make statements to the press, 49er's contention might arguably have merit." (Appendix A, p. 19) (Emphasis added.)

The decision of the court below admits, in its opinion, that GM based its decision to terminate the 49er relationship, in part, on protected First Amendment rights but goes on to find that if the same expression made to government is also made to GM through its employees and they allege these expressions have disrupted the relationship, then 49er is no longer protected by the First Amendment.

The court below did not make an independent examination of the whole record and balance the total protected expression by 49er against GM's wrongdoing. This Court requires an independent review as was held in *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) ____ U.S. ____, 104 S.Ct. 1949, 1958:

> ". . . cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times v. Sullivan* (1964) 376 U.S. 254, 284-286, 84 S.Ct. 710, 728-729 (Balance of citations omitted.)

The court below does not mention that the same information sent to GM was also given to a U.S. Senate Committee and the State of California Consumer Affairs Division. The court below found its primary duty to determine if the decision below was supported by substantial evidence and in Footnote 1 only mentioned legislative and congressional bodies as if petitioning the government takes a back seat to the interests of GM.

IV

GM'S SECOND TERMINATION LETTER IN 1981, ADDING A REDUCTION IN CHEVROLET PASSENGER CAR SALES AS A SECOND REASON FOR NON-RENEWAL OF 49ER'S FRANCHISE AGREEMENT, WAS AN EFFORT TO CLOUD GM'S REAL REASON FOR NON-RENEWAL: THAT OF OBJECTING TO 49ER'S FIRST AMENDMENT RIGHTS, THE ONLY REASON FOR NON-RENEWAL IN 1979

The Board, the Superior Court and the Court of Appeal, skirted the First Amendment rights of 49er, by accepting GM's argument that 49er's downturn in passenger car sales, the first in 45 years, as the primary reason for non-renewal. There is no link between GM's intent to not continue 49er's franchise in 1979 for free expression and the sales issue tendered in 1981.

The Court of Appeal in *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corporation* (1980) 627 F.2d 44 made the following observation with regard to termination intent and timing:

> "Further, there is evidence that defendant formed intent to discontinue plaintiff well before the 1978 decline in plaintiff's sales of Rain Bird products became apparent (Tr. 331-34), thereby undermining any asserted link between plaintiff's post-acquisition conduct and defendant's decision to terminate."

It is obvious, it was GM's intent to terminate 49er in 1979 for speaking out about GM's manner of handling new vehicle warranty and not for any other reason.

Automobile manufacturers take exception to dealers speaking out in opposition to their activities. This was the case in *Swartz v. Chrysler Motors Corporation* (1969) 297 F.Supp. 834 when the district court granted a preliminary injunction preventing a dealer termination before a jury had an opportunity to make findings of fact.

In *Swartz,* Chrysler claimed it was terminating the franchise because of low sales, however, the court felt there was a real question as to the true reason:

> "It is a jury question whether Chrysler's action was motivated by honest business judgment or by personal animosity against plaintiff's president Samuel A. Liberto because of his prominent part in promoting opposition by privately-financed dealers to operation of 'factory-stores' or for other insufficient reasons."

In First Amendment cases the appellate court makes an independent review of the complete record in order to balance all the evidence to make sure First Amendment issues are not obscured by unrelated evidence.

CONCLUSION

State agencies should maintain their position of arbitrator in any dispute involving a franchisor and franchisee and not become involved with one side or the other in the proceedings. This is especially important in proceedings involving First Amendment rights of one of the parties and the state, as arbitrator, should be required to maintain a neutral position. However, states should be encouraged to promote and protect those who petition the government for a redress of grievances in accordance with the First Amendment.

In the automobile industry, the powerful automobile manufacturers are in a position to stifle the free flow of information from their franchisees. The chance of losing a franchise held for years or, possibly, one's livelihood places a "chilling effect" on any speech that is adverse to the thinking of the franchisor.

Every franchisee realizes his business is expendable when placed in relationship to the total business of the franchisor. Without a decision by this Court making it unlawful for industrial giants to stifle free expression about wrong doing and unsafe products by their franchisees, valuable information needed by government to enforce the laws and warnings to consumers of latent defects by sellers will never reach the marketplace.

Dated: September 12, 1985

RICHARD E. WILMSHURST
Appellant, Pro Se

Appendix A

In the Court of Appeal of the State of California
in and for the Third Appellate District
(Calaveras)

3 Civil 23426
(Super.Ct.No. 11169)

Richard E. Wilmshurst, etc.,
Petitioner,

vs.

New Motor Vehicle Board,
Respondent,

Chevrolet Motor Division of General Motors Corporation,
Real Party in interest and Respondent.

[Filed Mar. 4, 1985]

This appeal is the latest chapter in a saga involving the Chevrolet Division of General Motors ("Chevrolet") and the vocal owner of 49er Chevrolet ("49er"), Richard Wilmshurst, and arises out of Chevrolet's attempt to finally put an end to its long and stormy business relationship with 49er Chevrolet. 49er appeals from a judgment denying its petition for a writ of mandate directing the New Motor Vehicle Board ("Board") to set aside its decision that Chevrolet had "good cause" for refusing to renew 49er's automobile dealer franchise. 49er's thick brief is devoted primarily to allegations of criminal wrongdoing on the part of Chevrolet. However, Chevrolet is not on trial here on criminal charges. The primary issue before us is whether the Board's and trial court's decisions are supported by substantial evidence. We conclude they are and shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On October 23, 1979, the general sales manager of Chevrolet, Mr. R. E. Cook, notified Richard Wilmshurst, president of 49er

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[1] The relationship between 49er and Chevrolet has been a fruitful source of litigation in both state and federal courts of all levels, and matters of controversy between the parties have been brought before this

Chevrolet in Angels Camp, that Chevrolet would not enter into a new automobile dealer franchise agreement with 49er after the expiration of the then-existing agreement. Setting forth the reasons for Chevrolet's decision, Mr. Cook stated: "During the past several years, you have repeatedly impugned the honesty, integrity and business practices and ethics of the Chevrolet organization, to the extent of accusing Chevrolet of knowingly flouting state and federal laws. You have even attempted to intimidate individual employes [sic] by, among other things, accusing them of deliberate misrepresentation, fraud and criminal misconduct, and by stating to them that they are placing themselves in jeopardy merely by carrying out their job responsibilities. This course of conduct has made it extemely difficult and unpleasant for our employes [sic] to deal with you and it has eroded and ultimately destroyed the trust, confidence and respect that is essential to any productive business relationship."

In April 1980, 49er filed a protest with the New Motor Vehicle Board to determine whether Chevrolet had "good cause" to refuse to renew the franchise. (Veh. Code, § § 3050, subd. (d); 3060, 3061.) 49er alleged its conducts was justified in the face of numerous illegal practices on the part of Chevrolet, the most significant of which include: (1) forcing 49er to provide warranty labor and parts below its cost of providing warranty service, in violation of Business and Professions Code section 17048.5 and Civil Code sections 1793.5 and 1793.6; (2) violating the above provisions by imposing a strict 30-day limit on the submission of warranty billings; (3) increasing the prices of automobiles 49er has ordered for private retail consumer prior to 49er's receipt of official written notice of price increase, in violation of Vehicle Code section 11713.3; (4) coercing dealers into entering sales contests conditioned upon wagering entry fees, in violation of

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and other courts by way of writ, and before administrative tribunals and Legislative and Congressional bodies. We will not attempt to set forth such matters except as they are relevant to the discussion of the issues before us. Nor will we set forth in this section a detailed rendition of the facts leading to the termination of the relationship between 49er and Chevrolet; rather, we will relate the relevant facts in more detail in the discussion.

Penal Code section 337a and federal law; and (5) illegally fixing the prices which 49er charges to transportation companies for the repair of vehicle damages occurring during shipment.

From August to October 1980, the Board conducted a hearing generating nearly 5000 pages of testimony and numerous volumes of exhibits. The Board found that from the 1973 to 1980, Wilmshurst repeatedly accused Chevrolet employees personally of illegal and unethical acts, including violations of the Vehicle Code and other state and federal laws; harassment; price-fixing; economic coercion; theft; extortion; moral decay; dishonesty; fraud; misrepresentation; retaliatory practices; "covering up" wrongdoing; "dirty tricks", and conspiracy to commit illegal acts. Wilmshurst often intimated to Chevrolet employees that they would be personally subject to civil and criminal penalties, including jail terms.

The Board concluded "Chevrolet did establish that Wilmshurst engaged in a course of conduct attacking Chevrolet's policies and required procedures as well as Chevrolet personnel charged with implementing such policies." However, it found "all the disputes between the parties involved, or had their origin in, Chevrolet's policies pertaining to reimbursement of 49er for sums owed to 49er by Chevrolet." The Board found "Wilmshurst's conduct disrupted the relationship between the parties" and in the absence of other circumstances "would be unjustified and inexcusable", but concluded Wilmshurst's "belief that Chevrolet's policies and procedures operated unfairly and illegally against his dealership was reasonable and held in good faith." Although the board did not condone "the manner and method chosen by Wilmshurst to attempt to rectify" the situation, it found Chevrolet's practices mitigated against allowing it to terminate the franchise, and concluded Chevrolet did not show "good cause."

On August 21, 1981, the Superior Court of San Francisco granted Chevrolet's petition for writ of mandate to set aside the Board's decision. The court concluded, inter alia, that participation of automobile dealer members of the Board in the deliberative process without participation of members representing manufacturers deprived Chevrolet of an impartial tribunal. The decision was affirmed by the Court of Appeal for the First

Appellate District. (Chevrolet Motor Division v. New Motor Vehicle Bd. (1983) 146 Cal.App.3d 533.)[2]

After the Superior Court of San Francisco issued the writ of mandate in the first action, Chevrolet again notified Mr. Wilmshurst it intended to discontinue doing business with 49er, citing two reasons: "Since October 31, 1980, when the Dealer Sales and Service Agreement expired, you have continued to engage in the kind of conduct which caused Chevrolet not to offer 49er a new Agreement. Furthermore, during the first eight months of this year [1981], 49er sold only 10 Chevrolet automobiles; from *June through August of this year, 49er sold just five Chevrolet automobiles.*" (Original italics.)

On October 6, 1981, 49er filed a second protest with the Board. In a considerably shorter hearing, evidence was introduced on Wilmshurst's conduct since the first hearing and 49er's sales performance in Chevrolets for the first nine months of 1981.[3] The Board concluded: "Since the Board's hearing on the 1980 protest, Wilmshurst has continued to engage in conduct which the Board previously found to be disruptive of the relationship between the parties. The Board's prior decision indicated that the Board did not condone the manner and method chosen by Wilmshurst to attempt to rectify what he perceived to be inequities. In spite of the Board's statements, Wilmshurst persisted in his disruptive course of conduct. [¶] Wilmshurst used threats of criminal, economic, and moral sanctions in his attempts to coerce and

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[2] In American Motors Sales Corp. v. New Motor Vehicle Board (1977) 69 Cal.App.3d 983, we held that participation of dealer members of the board in decisions on controversies between dealers and manufacturers was a denial of due process. Subsequently, the Legislature amended Vehicle Code sections 3050 and 3066 to provide dealer members "may participate in, hear, comment, or advise other members upon, but may not decide," controversies between dealers and manufacturers. (Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) The court in *Chevrolet* held even this more limited participation was unconstitutional without participation by manufacturers. (At p. 541.)

[3] The Board and the trial court in this case also took judicial notice of the record of the first hearing.

intimidate Chevrolet's personnel . . . despite the fact that he did not believe Chevrolet's personnel or practices were in any way discriminating against 49er or himself personally. [¶] This conduct by Wilmshurst was unjustified and inexcusable in light of all the circumstances. Wilmshurst's conduct effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." The Board also found "the amount of business transacted by 49er was inadequate as compared to the business available to 49er" and "it would not be injurious to the public welfare for the franchise to be replaced and the business of 49er to be disrupted." The Board concluded Chevrolet established good cause under Vehicle Code section 3061 to discontinue doing business with 49er.[4]

On January 5, 1982, 49er filed a petition for writ of mandate directing the Board to set aside its decision. The court denied the petition, concluding the findings of the Board were supported by the weight of the evidence and constituted "good cause" for Chevrolet's action. The court entered judgment accordingly. From this judgment, 49er appeals.

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[4] Vehicle Code section 3061 provides: "In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, *but not limited to,* all of the following: [¶] (a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee. [¶] (b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise. [¶] (c) Permanency of the investment. [¶] (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted. [¶] (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public. [¶] (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee. [¶] (g) Extent of franchisee's failure to comply with the terms of the franchise." (Italics added.)

DISCUSSION

I

The primary issue on appeal is whether the decision below was supported by substantial evidence.[5] The Board based its determination of good cause primarily on two findings. First, it concluded "the amount of business transacted by 49er was inadequate as compared to the business available to 49er. Second, it found "Wilmshurst engaged in a course of conduct attacking Chevrolet's policies and procedures as well as the conduct and character of the Chevrolet personnel charged with implementing such policies" and persisted in doing so following the 1980 protest hearing; that such conduct "was unjustified and inexcusable in light of all the circumstances" and "effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." The trial court found these conclusions were supported by the weight of the evidence. We examine each of these conclusions in turn.

A. Sales Performance For 1981

Viewing the evidence in the light most favorable to the judgment, the record discloses the following facts.

In August or September 1980, Mr. Wilmshurst directed the business of 49er Chevrolet toward an emphasis on selling used cars. He cited as reasons the low profits on new vehicles and a poor market for new U.S. cars. For similar reasons Wilmshurst sought and acquired a franchise for the sale of Subarus, Japanese-made cars. While he was in the process of obtaining the Subaru franchise, Mr. Wilmshurst stated in a letter to a Subaru executive, "it would appear that doing a good sales and service job for

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[5] The trial court exercised its independent judgment, reviewing the entire record and determining the findings and decision of the Board were supported by the weight of the evidence. Our review is thus limited to determining whether substantial evidence supports the findings of the trial court. (Patterson v. Central Coast Regional Com. (1976) 58 Cal.App.3d 833, 842.)

Subaru would be more rewarding than doing the same job for a major U.S. manufacturer."

In June 1981, 49er began joint operation as a Subaru and Chevrolet dealership. At the time, it had 11 Subarus in its inventory and seven Chevrolets.) By August 1981, 49er stocked 18 Subarus and only four Chevrolets. In September, 49er had 20 Subarus and six Chevrolets in its inventory.

After becoming a Subaru dealer 49er advertised the sale of Subarus on a local radio station and in two newspapers. Mr. Wilmshurst had no recollection or knowledge of whether 49er similarly advertised Chevrolets during the first nine months of 1981. However, from January 1, 1981, through April 1981, while 49er was exclusively a Chevrolet dealer, its vehicle advertising expenses totaled $907. From the time 49er became a Subaru dealer in June, until September 1981, it spent $3,862 on the advertisement of Subarus.

Between June 1 and September 30, 1981, 49er sold 41 Subaru vehicles while selling only five Chevrolet passenger cars. In the first nine months of 1980, 49er sold at retail 32 Chevrolet passenger cars and 84 Chevrolet trucks for a total of 116 Chevrolet vehicles. During the same period in 1981, 49er sold only 12 Chevrolet cars and 20 Chevrolet trucks for a total of 32 vehicles. The drop in car sales alone was 62.5 percent; the drop in truck sales was 76 percent. Car sales for Chevrolet's Oakland Zone as a whole (which encompasses Northern California and Hawaii) dropped only 7.3 percent. Within its district (encompassing 13 dealerships) 49er had the highest percentage drop in car sales in 1981. Of 136 dealerships in the Oakland Zone, only one had a higher percentage drop and sold fewer cars, and that dealership was in severe financial trouble at the time.

In analyzing 49er's sales penetration, Chevrolet compared the total number of new Chevrolets registered in 49er's area of sales responsibility from January to August 1981 with the number of new Chevrolets sold by 49er during that period. Twenty-six new Chevrolet cars were registered in the area while 49er sold only 11 new Chevrolet cars. This is described as a "pump-in" factor, indicating other dealers sold 15 of the Chevrolets registered

within 49er's area of sales responsibility. Sales of trucks in 49er's area of responsibility also showed a "pump-in" factor: 32 trucks were registered while 49er sold only 20 trucks. For 49er's district as a whole, as well as in the Oakland Zone, there was a "pump-out"; that is, more cars were sold within the district and the zone than were registered there.

Based on 49er's penetration of sales compared to the penetration for the Oakland Zone and the national average, 49er's performance was considered not effective.

The recited evidence provides substantial support for the Board's conclusion that the amount of business in Chevrolet vehicles transacted by 49er was inadequate compared to the business available to it.

49er does not dispute this evidence. Rather, it cites evidence on the record indicating more effective sales performance for past years. Such evidence is irrelevant; Chevrolet based its decision to discontinue the business relationship on poor sales performance in 1981.

49er also contends its decision to concentrate on the sale of used cars and Subarus was economically justified. This, too, is irrelevant. The mere fact 49er made a business decision that may have been sound from *its* standpoint does not militate against finding its performance in the sale of Chevrolets was inadequate from *Chevrolet's* standpoint. Chevrolet cannot be compelled to continue its relationship with a dealership that has virtually abandoned efforts to sell its cars, regardless of the reason. It is entitled to a dealership that will exert its best effort to sell Chevrolet vehicles.

Finally, 49er contends market conditions contributed to its poor sales performance. Assuming this was a contributing factor, it does not explain the fact 49er had the second lowest sales performance in the entire Oakland Zone in 1981. The evidence demonstrates 49er maintained a low inventory of Chevrolets and virtually ceased advertising them after it became a Subaru dealer. These factors affect sales performance.

The findings with respect to sales performance are supported by substantial evidence.

B. Wilmshurst's Conduct

From the outset, 49er has attempted to turn these proceedings into a trial over the legality and morality of Chevrolet's business practices. As we noted initially, Chevrolet is not on trial for criminal conduct in this case and we shall make no determination with respect to its innocence or guilt of wrongdoing. We accept that Mr. Wilmshurst could have believed in good faith that Chevrolet's practices violated certain state and federal laws, although, like the trial court, we find no evidence clearly establishing Chevrolet violated any law. The question before us is whether substantial evidence supports the findings that Mr. Wilmshurst's conduct toward Chevrolet in seeking redress of his grievances was "unjustified and inexcusable" and "precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." A sampling of Mr. Wilmshurst's correspondence provides more than ample evidence in support of the findings.

The strained relations between 49er and Chevrolet appear to have originated in Mr. Wilmshurst's dissatisfaction with Chevrolet's warranty practices. Mr. Wilmshurst has asserted throughout that Chevrolet pays for warranty work at a price below 49er's cost of doing such work and places an unjustifiably short time limitation on the submission of warranty bills. As a result, Wilmshurst began submitting bills for warranty work at a cost greater than that set by Chevrolet's formulas. After conducting an audit of 49er in 1973, Chevrolet found it had overpaid some $3,000 in warrant claims to 49er and it charged back this amount to 49er's and Chevrolet's mutual account. When 49er refused to pay this charge, Chevrolet began sending parts to 49er on a C.O.D. basis. In a letter to Chevrolet's zone manager, Wilmshurst accused him personally of acting in bad faith and called the act of putting him on C.O.D. "vicious."

In 1975, Wilmshurst sent a letter to the assistant general sales manager for Chevrolet stating, "the application of the criminal and civil antitrust status to General Motors [sic] mode of

operendi in the automobile warranty area . . . gives me a chill when I project the possible consequences. [¶] General Motors is not the innocent industrial giant who obeys the rules even when profit may be injured." He accused Chevrolet of "almost ruthless practices in the warranty area" and "using economic force to settle matters, rather than good faith review of issues that arise in the course of business."

The warrant controversy resurfaced in 1977, at which time Chevrolet again placed 49er on C.O.D. status. Wilmshurst accused Chevrolet's zone manager of engaging in "economic force" and threatened to "secure a temporary restraining order to correct any illegal action you might take." In another letter to the zone manager, Wilmshurst accused him of using "extortive methods of collecting this unauthorized charge."

Later, Wilmshurst stated to the president of General Motors "that Chevrolet's methods of fixing the dealer's warranty rates and warranty parts below the cost of doing business is a violation of civil and criminal anti-trust statutes." He stated the "warranty procedures produce the atmosphere of steal or be stolen from" and requested that Chevrolet "proceed in any disagreement with 49er Chevrolet in a manner that is not tortious . . . ." At the same time, he accused the zone manager of extortion and a "lack of business principal [sic] and moral decay," and stated, "the time may come where you may find yourself caught up in complex litigation as the General Electric executives who were indicted for price-fixing and were sentenced to jail terms." He implored the zone manager "to play according to societies [sic] rules; try it you might like it."

Wilmshurst accused Chevrolet's Western Area sales manager, Mr. Stacy, of "quasi-extortion" and "unilateral conversion" and suggested his position will "lead to the indictment of GM officials by a federal grand jury for price-fixing." He charged Stacy with making "Illegal charges to a California *mutual account* and forc[ing] collection of those amounts by destroying the service business of the objecting dealer." He also accused him of believing "General Motors was above the law" and stated he was subject to "litigation in several states." He implied Mr. Stacy was engaging "in unlawful acts for the purpose of profit," and stated

that if Chevrolet could not collect the disputed amount legally, "don't try to steal it."

The controversy reached a fevered pitch in 1978. On March 25, Wilmshurst sent a letter to the service manager for Chevrolet, Mr. Croft, detailing alleged criminal violations of the Business and Professions Code in the warranty practices. He stated, "After reviewing the Business and Professions Code it appears that all agents of General Motors Corporation along with G.M. itself are responsible for violations .... It also appears that such acts are crimes .... In this area it might be well to consult your attorney to establish your personal liability to a State penal action."

In a letter to Chevrolet's regional manager, Mr. Davidson, Wilmshurst made the same accusations of criminal violations and charged that Chevrolet "through unlawful acts has underpaid 49er Chevrolet in excess of $150,000 in the last ten years." Wilmshurst accused Mr. Davidson of "join[ing] with others to force the present program of parts pricing upon 49er Chevrolet."

In a letter to Mr. Stacy, Wilmshurst charged Chevrolet with another series of illegal acts. He accused Mr. Stacy of representing that General Motors "is above the requirements of the law" and contended placing 49er on C.O.D. status "was put into effect to attempt to coerce us into allowing you to extort funds from our business to subsidize your warranty costs", which is "unlawful under California law." He asserted Chevrolet personnel have failed to fill orders in violation of criminal statutes. He reiterated his contention that Chevrolet's warranty practices violated the law and could lead to "civil and criminal sanctions ...." He represented that the Attorney General's Office was of the opinion that General Motors was violating the law and suggested state authorities "are leaning toward the criminal process." Finally, he accused Chevrolet of "'*unfair trade practice*'" and "'Plumbers' like retaliation."

On May 22, 1978, Mr. Wilmshurst received a letter from Chevrolet's zone manager, Mr. West, in which West asked Wilmshurst to direct any correspondence regarding violations of the law to General Motors' counsel. Wilmshurst refused to contact General Motors' attorneys "as our close business relation-

ship demands that we deal directly." Wilmshurst continued to repeat allegations of criminal wrongdoing, stating, "we have the basis of a prosecution: The People of the State of California vs. Employees for the Chevrolet Motor Division." He accused General Motors of "overreaching" and abuse of power.

On June 5, 1978, Wilmshurst wrote a letter to Mr. Stacy about a meeting between them at a new car showing in Las Vegas, described by Wilmshurst as a "clandestine hotel meeting," the purpose of which was to "put the squeeze on the little Chevy dealer from Angeles Camp." He accused Mr. Stacy of stating he "didn't care about California law," and asserted his actions "have been amoral and in violation of California law." He suggested that Mr. Stacy conduct himself "in such a manner in your business practices that you would not mind reading a recap of your business day on the front page of the Detroit Times." Wilmshurst accused Stacy of "personally us[ing] unlawful and malicious tactics to injure me and my business in order to force me to allow you to continue shortchanging my dealership for warranty work performed in violation of California law." He concluded, "You have taken your stand similar to Nixon's practice when he was quoted as saying, 'Stonewall 'em'. It didn't work in 'Watergate' and it won't work in 'Motorgate'."

On June 5, 1978, Chevrolet's attorney again requested that any charges of illegality be sent to him, and stating it was his opinion Chevrolet was not violating the law. Wilmshurst responded by stated the attorney's opinion "appears to be ill conceived" and evinced "a lack of understanding in GM warranty procedures and their application."

On August 9, 1978, Wilmshurst accused Mr. West of working together with Mr. Davidson and Mr. Croft "in an attempt to force 49er Chevrolet to provide warranty parts at prices below our cost as defined in § 17026 of the California Business and Professions Code." Wilmshurst penned another letter to Mr. West stating he "look[ed] forward to you making policy changes . . . that will assist in changing the image of General Motors from the giant unfair corporation to the business that not only deals in fine vehicles but fair business principles."

On September 19, 1978, Wilmshurst reasserted to Mr. West that Chevrolet's warranty practices violated the Business and Professions Code, and stated, "A person of average intelligence can understand from the statute what the elements of the violation would be."

On September 20, Wilmshurst complained to Mr. West about Chevrolet allegedly misrepresenting the date vehicle billings were received. He accused Chevrolet of criminal false pretenses and stated, "your procedure is laced with fraud and your failure to correct these known overbillings amount to the element of intent." The same day, Wilmshurst stated in another letter to Mr. West that certain of Mr. West's letters in response "appear to be some form of harassment with regard to vehicle billing and payment." He again accused Chevrolet of intentional fraud. On September 25, Wilmshurst restated his charges of misrepresentation in billings.

On October 17, 1978, a controversy arose when Wilmshurst accepted Mr. West's offer to enter a dealer contest. He complained about the entry fee, charging it was a solicitation of a wager in violation of section 337 of the Penal Code. He inisted that Chevrolet modify its contest "to conform to the [requirements of the] Penal Code statute cited above." Chevrolet's attorney responded with an opinion that the contest did not violate the Penal Code. Wilmshurst answered with a letter characterizing the attorney's opinion as "beyond belief as the product of a California attorney" and "made without a full understanding of the statute or factual circumstances involved therein." He accused the attorney of attempting to provide Chevrolet "with the defense of reliance upon the advice of competent counsel to the charges of criminal conduct," and suggested he was in violation of the Rules of Professional Conduct by assisting his client "in conduct the attorney knows, *or should know,* is illegal." He closed by telling the attorney, "we would appreciate your doing your homework and making that homework evident by giving some support to your off-the-cuff opinions."

On December 11, 1978, Wilmshurst again accused Mr. West of criminal misrepresentation in vehicle billings and stated, "your remedy of if you catch me I'll pay you back is absurd. You are not

being harrassed; you are being given good advice on the correction of an unlawful act within your control."

On December 15, Wilmshurst again accused Chevrolet of violating various statutes and complained to Mr. West about the forms he had to submit in order to receive reimbursement for overbilled vehicles, stating, "These f------ forms you send serve no logical purpose other than to delay compensating us . . . [¶] You could have processed this claim after we pointed out Chevrolet's error without returning it to us. More time is wasted with this B--S--- than is spent selling cars and satisfying Chevrolet customers."

On May 24, 1979, in a letter to Mr. West, Wilmshurst accused Chevrolet's district manager, Mr. Hill, of attempting to coerce 49er into participating in all of Chevrolet's programs. He stated, "Mr. Hill's parting comments were to the effect that he wasn't interested in servicing our dealership unless we had an open checkbook for every Chevrolet campaign that came down the pike so he could be rated as a proficient District Manager; . . . Mr. Hill indicated that he controlled our distribution of merchandise and that we had better play ball with him or we could deal directly with Mr. Mike Hoover or you if we wanted to have sold orders placed."

When Mr. West defended Mr. Hill's version of events, Wilmshurst accused Mr. West of "express[ing] the protective management philosophy 'you lie and I'll swear to it'." He suggested Mr. West defended Mr. Hill "because he is doing just what you have told him or you are a poor judge of character." He closed: "Most likely G.M.'s top management would not tolerate what goes on in Chevrolet's dealings with its small dealers; however, the truth is most likely not relayed to top management by corporate ladder climbers. [¶] Mr. West, be truthful, honest and fair and we will have a most 'fruitful business' relationship."

On August 14, 1980, Wilmshurst complained to Chevrolet's general sales manager, Mr. Cook, about Chevrolet's warranty practices. He asked, "Is this the manner in which the largest manufacturing corporation in the world should treat a dealer by attempting to evade payment of a legitimate billing for work

performed. This is indeed a sad example of the misuse of corporate power."

In 1980 a controversy arose over Chevrolet's procedures for reimbursing dealers for repairs of damages done to vehicles during shipment. Under Chevrolet's procedures, the dealer submits the repair bill to Chevrolet, rather than directly to the transportation company. The transportation company then pays the amount for repair parts set by Chevrolet and Chevrolet in turn pays the dealer. Apparently unsatisfied with this procedure, Wilmshurst sent a repair bill directly to a transportation company and asked for payment "notwithstanding Chevrolet policies and procedures," because "we have had difficulty in processing and receiving payment from Chevrolet Motor Division." When the company refused to pay, Wilmshurst accused the company of illegally fixing the resale price of parts used to repair transportation damage. The company responded it was not refusing to pay but simply asking Wilmshurst to follow Chevrolet procedures. Wilmshurst responded that Chevrolet's procedures amounted to illegal price-fixing and later accused the company of participating with General Motors in illegal vertical price-fixing.

Following the first protest hearing in October, 1980, Wilmshurst's contentiousness did not abate. In February, 1981, Wilmshurst again attempted to collect on the damage bill and told the transporation company that the Board "has found for 49er Chevrolet on its petition" and if 49er did not receive a check it will bring an action for "trebble damages based upon the price-fixing element established at the Chevrolet hearings."

In fact, the Board did not determine Chevrolet engaged in price-fixing, nor was the action based on a "petition" but rather a protest. The Executive Director of the Board sent a letter to Wilmshurst cautioning him "against misrepresenting the action taken by the . . . Board" in the first hearing. The director stated, "It is inconceivable that you should attempt to use the decision rendered by the Board in a manner which distorts the nature of the proceeding and distorts the determination of the Board, in an effort to collect damages claimed to be owed to 49er Chevrolet from an entity which was not even a party to the proceedings before the Board."

In October 1980 Wilmshurst sent a message to Chevrolet's assistant zone manager stating that an overbilling appeared on the October statement of account that is in violation of Vehicle Code section 11713.3, subdivision (h). In January 1981 Wilmshurst sent a vehicle order form to Mr. West along with a message complaining about new vehicle overbilling: "As you will remember we aren't supposed to go through this hastle [sic]. The fact is your system does not work. It is illegal and it costs us unneeded expense. To this date, I have not received the credits you promised." On the form Wilmshurst attached a piece of tape with the words "red tape" written on it.

On January 23, 1981, Wilmshurst asked Mr. West to send him the forms required for requesting an increase in mechanic labor rates, stating, "Please send us the necessary (unnecessary) forms to complete so that we might advise you again that we will be raising our retail labor rate . . . . " After completing the forms Wilmshurst returned them to Chevrolet with a "red tape" sticker attached.

On the same day, Wilmshurst wrote to Mr. West to point out what he believed to be errors in Chevrolet's computation of the overbilling credits due 49er. Wilmshurst stated the credit calculated by Chevrolet "is screwed up" and Chevrolet's " 'established procedures' seem to be establishing a nightmare of accounting problems." Such problems "are all caused because Chevrolet persists in overbilling sold orders and such overbilling is against the law." Wilmshurst complained, "this is not the way for Chevrolet to run its operation. Dealers lose respect for the way Chevrolet does business when they can't even operate its own system." He closed, "[Y]ou told me we would have all the credits we had coming this month for sure and I said ho ho ho. Well, ho ho ho."

In February 1981 Chevrolet sent Wilmshurst a letter again requesting that any communications with respect to alleged illegal or unethical conduct be sent exclusively to Chevrolet's attorneys.

On March 17, 1981, Wilmshurst wrote to Mr. R. L. Cote, president of a San Diego Chevrolet dealership, about the problems of small dealerships. Wilmshurst made note of Chevro-

let's petition to overturn the first Board decision, stating, "Chevrolet's appeal indicates the willingness to invest over $1,000,000 in an attempt to put me out of business." With respect to the hearing Wilmshurst stated, "Every Chevrolet witness was exposed in not telling the truth and those that did were requested by G.M. Counsel to recant and were impeached by their own records thereafter."

In April 1981 Wilmshurst complained to Mr. Cook about the petition to overturn the Board's decision, stating, "Chevrolet does not intend to deal with 49er Chevrolet in 'good faith' and intends to injure the viability of 49er Chevrolet's business and myself personally." He stated he reviewed the testimony of Chevrolet officials at the first hearing and found it "indicate[d] that truth was not a virtue of Chevrolet's case."

At the hearing on the second protest, Mr. West testified that since the first hearing Chevrolet's relationship with 49er "is still very poor, probably the worst that I've ever seen." He testified Wilmshurst sent approximately 60 letters since the first hearing and continued to accuse Chevrolet employees of illegal and immoral conduct. Chevrolet employees refused to go to 49er's place of business without a witness.

The evidence recited above is exhaustive though not a complete recital of this voluminous record. It is sufficient to demonstrate that whatever the sincerity of Mr. Wilmshurst's beliefs with respect to the legality or morality of Chevrolet's practices, the Board and trial court properly found his conduct and manner of seeking redress was "unjustified and inexcusable" and "effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel." At all times Wilmshurst has had legal channels available to him to settle his dispute with Chevrolet, both in court and before the Board. The Board is specifically empowered to hear protests by dealers with respect to the reasonableness of manufacturers' warranty reimbursements. (Veh. Code, § 3065.) Yet Wilmshurst chose to persist in a campaign of personal threats and insults against Chevrolet employees in order to coerce a change in practices. Mr. Wilmshurst's conduct rendered it impossible for Chevrolet to effectively do

business with 49er and gave it good cause for ending the business relationship.

We now consider other issues raised by 49er.

II

49er contends public policy and the First Amendment protection of free speech preclude Chevrolet from terminating the franchise in retaliation for Wilmshurst's complaints about Chevrolet's alleged criminal conduct. We need not address this issue, as 49er's poor sales performance for 1981 provides independent grounds for termination. However, we have considered the contentions and they are meritless.

With respect to the public policy argument, 49er relies on Barela v. Superior Court (1981) 30 Cal.3d 244; Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167; and Custom Parking, Inc. v. Superior Court (1982) 138 Cal.App.3d 90. These cases established only a public policy against evictions and employment terminations when they are solely in retaliation for reporting crimes to the authorities or refusing to commit crimes at the direction of a superior.

The trial court correctly observed that if all Wilmshurst had done was report illegal conduct to the press and authorities, 49er might have a legitimate argument. However, the court found Chevrolet did not terminate the business relationship simply because Wilmshurst charged it with illegal conduct. Wilmshurst's conduct went "far beyond what might be reasonably required to provide information to the media, the government, or to Chevrolet's executives, of the alleged wrongdoing. . . . [¶] . . . Petitioner for many months, continuing long after he was requested to make his complaints as to illegality to counsel, and long after he was warned that is conduct 'disrupted the relationship' with Chevrolet, continued to engage its employees in a series of running battles over various issues . . . . [¶] . . . [Wilmshurst's] conduct here is in no way related to any responsible or legitimate effort to notify authorities, or the manufacturer or to obtain an adjudication on the merits of his complaints . . . . Instead of taking reasonable steps, [Wilmshurst] has persisted in his conduct and has created

a situation where a successful dealer-manufacturer relationship is so unlikely that there is indeed good cause to terminate it. That good cause . . . is based not on the fact that [Wilmshurst] sought to 'blow the whistle' on illegality, but rather because he engaged in a continued campaign resulting in a relationship that, in the words of . . . Mr. West, was 'probably the worst I have ever seen,' . . . "

The trial court's findings are supported by substantial evidence. Whatever role Wilmshurst's lawsuits and public statements may have had in Chevrolet's decision to end its relationship with 49er, it is clear the decision was premised primarily upon Wilmshurst's continuous campaign of personal insults and attacks against Chevrolet's employees. No public policy precludes a business from discontinuing its relationship with one who engages in such conduct.

49er next contends the termination of the business relationship contravenes Wilmshurst's First Amendment right to free speech, applied to states through the Fourteenth Amendment. Our previous discussion is applicable here. If all Wilmshurst had done was file lawsuits and make statements to the press, 49er's contention might arguably have merit. But the bulk of Wilmshurst's conduct consists of private correspondence to Chevrolet personnel accusing them of criminal wrongdoing, dishonesty and immorality. No First Amendment protection enfolds accusations that an individual has committed a crime or is personally dishonest (see Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 604), particularly where, as here, the accusations are primarily made through private channels.

In any event, the Fourteenth Amendment prohibits only state action. The termination of the relationship between Chevrolet and 49er is the result of a purely private decision on the part of Chevrolet. Although a large business "may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body", approval of a practice by the regulatory body, where it "has not put its own weight on the side of the proposed practice by ordering it," does not transmute the practice initiated by the business and approved by the regula-

tory body into "state action." (Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345, 357 [42 L.Ed.2d 477, 487].) Here, the state may take action with respect to the decision initiated by the automobile manufacturer only if the dealer files a protest. In the absence of a protest, the manufacturer is free to terminate the franchise without the approval of the Board. (Veh. Code, § 3060.) Chevrolet's "exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." (Jackson, supra, 419 U.S. at p. 357 [42 L.Ed.2d at p. 487].)

Neither the First Amendment nor public policy renders an automobile manufacturer powerless to end its relationship with a dealer who subjects the manufacturer's employees to years of virulent correspondence accusing them of criminal wrongdoing and moral degeneracy.

III

49er contends the Board violated a stay issued by the First District Court of Appeal when appeal was pending from the order of the San Francisco Superior Court overturning the Board's decision in the first protest.

Before the hearing on the second protest, the First District Court of Appeal, "pending further order," "temporarily stayed" the hearing insofar as it involved "issues determined" in the Board's first hearing. The order was issued pursuant to 49er's petition for order staying the proceedings or for writ of supersedeas or prohibition. On November 17, 1981, the court issued a final order on the petition which granted the writ insofar as it requested reinstatement of the Board's first decision pending outcome of the appeal, and denied the petition in all other respects.

The issue whether the Board violated the temporary order has long since been rendered moot by the final decision of the Court of Appeal affirming the Superior Court's order granting Chevrolet's petition for writ of mandate. (Chevrolet Motor Division v. New Motor Vehicle Bd., supra, 146 Cal.App.3d 533.)

Moreover, the Board did not violate the temporary stay. 49er's sales performance was not an issue in the first hearing with respect to Wilmshurst's conduct. The Board considered *evidence* of conduct which took place before the first hearing in order to place in proper context Wilmshurst's behavior since then. Nothing in the stay order prevented the Board from considering events which transpired before the first hearing.

IV

49er next contends the standards for establishing "good cause" for termination of a franchise are not sufficiently specific for constitutional purposes. We disagree.

A statute written " 'in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " (People v. Barksdale (1972) 8 Cal.3d 320, 327; Connally v. General Construction Co. (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328].) However, acts of the Legislature "come before us clothed with a presumption of constitutionality." (In re Dennis M. (1969) 70 Cal.2d 444, 453.) " 'All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears. [Citations.]' " (*Ibid.*; see Lockheed Aircraft Corp. v. Superior Court (1946) 28 Cal.2d 481, 484.) All that is required is reasonable certainty and a statute will not be held void for vagueness if any reasonable and practical construction can be given to its language. (County of Nevada v. MacMillen (1974) 11 Cal.3d 662, 673; People v. Victor (1965) 62 Cal.2d 280,300; Lockheed Aircraft Corp. supra, at p. 484.)

"Good cause" is not unconstitutionally vague; it is commonly and practically used in many legal contexts. " 'The law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as "reasonable," "prudent," "necessary and proper," "substantial," and the like. Indeed, a wide spectrum of human activities is regulated by such terms . . . [y]et standards of this kind are not impermissibly

vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind.' " (County of Nevada v. MacMillen, supra, 11 Cal.3d 662, 673.)

As a general standard, "good cause" may be defined as "an adequate cause," a cause that comports with the purposes of the statute and other laws. (Syrek v. California Unemployment Insurance Appeals Board (1960) 54 Cal.2 519, 529; Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal.3d 55, 70.) The legislation embodying section 3061 was enacted "to promote the public welfare" by regulating the automobile sales network in California "in order to avoid undue control of the independent new motor vehicle dealer by the vehicle manufacturer or distributor and to insure that dealers fulfill their obligations under their franchises and provide adequate and sufficient service to consumers generally." (Stats. 1973, ch. 966, § 1.)

Certainly inadequate sales of the manufacturer's product compared to the business available constitutes "good cause" for terminating a franchise and comports with the purpose of the statute to promote consumer welfare. This is one of the specific considerations set forth in Vehicle Code section 3061. The standard could not be more specific without making it " 'so detailed as to restrict the exercise of any real judgment by [the agency].' " (Piano v. State of California ex. rel. New Motor Vehicle Bd. (1980) 103 Cal.App.3d 412, 418.) Whether any particular level of sales constitutes "good cause" for termination of a franchise necessarily depends upon the particular facts of each case; no number standard can be established for all dealerships.

With respect to Wilmshurst's conduct, while this is not one of the considerations set forth in section 3061, those considerations are not exclusive. It is perfectly consistent with the promotion of consumer welfare to permit a manufacturer to terminate its relationship with a dealer who, through years of insults, personal charges of criminal and moral wrongoing, and uncooperativeness, has destroyed the confidence and cooperation necessary for maintaining an effective business relationship. The law cannot "require a manufacturer to entrust the marketing of its products in a wide area to a distributor with whom a relationship of confidence and cooperation has been rendered impossible . . . ." (Thayer Plym-

outh Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal.App.2d 300, 304.) No more specific standard as to the conduct constituting "good cause" for termination can nor need be promulgated. As it stands, the good cause standard can be objectively applied. Any reasonable person looking at Wilmshurst's conduct would agree it provided Chevrolet "good cause" to terminate its relationship with 49er.

Wheeler v. State Bd. of Forestry (1983) 144 Cal. App. 3d 522, upon which 49er relies, is inapposite. That case involved a proceeding by the State Board of Forestry to revoke the professional license of a forester for "gross incompetence." We determined the accusation did not comply with the Administrative Procedure Act because it did not specify " 'the statutes and rules which the respondent is alleged to have violated.' " (Gov. Code, § 11503.) Moreover, the agency had not adequately defined the meaning of "gross incompetence" because it had not set forth the professional duties to which that term related. (144 Cal. App.3d at pp. 527-528.)

This case does not involve an action initiated by the state to revoke a state-granted license; rather it is a private decision to cease doing business with a franchise, acquiescenced in by the state. Moreover, Government Code section 11503 does not apply to New Motor Vehicle protests. Vehicle Code section 3066, subdivision (a), specifies the Administrative Procedure Act provisions applicable to Board hearings and the only applicable provisions are those relating to discovery, depositions, evidence, affidavits, official notice, and decision. Finally, as we discussed above, the "good cause" standard is adequate in the context in which it is used.

V

49er finally contends it received an unfair hearing because the hearing officer was "obviously" biased against it. 49er bases this argument on the hearing officer's letter to Wilmshurst following the first protest in which he warned Wilmshurst against misusing or misinterpreting the Board's decision.

49er did not preserve this issue for appeal. The disqualification of a judicial officer "must be asserted at the 'earliest practicable opportunity' after learning of the grounds therefor, otherwise it is deemed waived." (Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal.App.3d 143, 150.) 49er was aware of possible grounds for disqualification long before the second hearing. Its failure to raise the issue until after the Board's decision waived the objection.

Nor has 49er failed to adduce sufficient evidence of bias. "Bias and prejudice are never implied and must be established by clear averments.' . . . [¶] Thus, our courts have never required the disqualification of a judge unless the moving party has been able to demonstrate concretely the actual existence of bias." (Andrews v. Agricultural Labor Relations Bd. 28 Cal.3d 781, 792-793.)[6] The hearing officer's letter does not demonstrate actual bias; rather, in the words of the trial court, it "is forthright and factual" and "simply evidence that Mr. Jennings [the hearing officer and Executive Director of the Board] was doing his job in a business-like manner."

DISPOSITION

The judgment is affirmed.

Carr, J.

We concur:
Regan, Acting P.J.
Sims, J.

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[6] These rules apply to judicial officers in administrative proceedings. (*Id.*, at p. 794.)

Appendix B

California Vehicle Code Sections

* * *

§ 3000. *Board Created*

There is in the Department of Motor Vehicles a New Motor Vehicle Board, which consists of nine members.

§ 3010. *Quorum*

Five members of the board shall constitute a quorum for the transaction of business, for the performance of any duty or the exercise of any power or authority of the board, except that three members of the board, who are not new motor vehicle dealers, shall constitute a quorum for the purposes of Article 4 (commencing with Section 3060) of this chapter.

§ 3050. *Duties*

The board shall do all of the following:

* * *

(d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060).

§ 3060. *Termination of Franchise*

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of

multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

§ 3601. *Good Cause*

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

* * *

§ 3066. *Hearings on Protests*

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer designated by the board,

shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to this article. Dealer participation shall be recorded in the minutes of the meeting.

Appendix C

State of Rhode Island and Providence Plantations [Letterhead]

Department of Attorney General
Division of Consumer Protection
56 Pine Street
Providence, R.I. 02903

Julius C. Michaelson, Attorney General

November 17, 1977

Mr. Richard E. Wilmshurst, President
49er Chevrolet
P.O. Box 65
Main Street, Hiway 49
Angels Camp, CA 95222

Dear Mr. Wilmshurst:

I am in receipt of your letter dated November 14, 1977 in which you indicate that the warranty reimbursement issue may raise potential violations under the Sherman and Clayton act. Moreover, in our recent telephone conversation, you indicated that the 9th Circuit has recently ruled that the standard contracts used by the automobile manufacturers and dealers violate federal anti-trust law.

I am very much interested in both of these issues in that they may be the grounds for valid counter-claims in the present Rhode Island litigation. I would therefore request any and all information relative to the above issues.

Thank you very much for your information and kind courtesy. I will keep you advised of any developments in the Rhode Island federal court litigation.

Very truly yours,

/s/ GREGORY L. BENIK
Special Assistant
Attorney General

Appendix D

49er Chevrolet [Letterhead]
Telephone 209-736-2514
P.O. Box 65
Main St., Hiway 49
Angels Camp, Calif. 95222

March 17, 1978

Mr. Dan Jaffe
Senate Commerce Commission
Rm. 5202, Dirkson Senate Office Building
Washington, D.C. 20500

Dear Mr. Jaffe:

Thank you for your invitation to comment to your committee on the effects of the new car manufacturer's warranty procedures as it affects the consumer and the small businessman.

It would seem best to preface my remarks by giving your committee a short background on 49ER Chevrolet, myself and my overview of the warranty problem before going into any specifics.

49ER CHEVROLET: 49ER Chevrolet is located in the foothills of the Sierra Nevada Mountains in Northern California. The market area served contains about 17,000 people who live on 1,000 square miles that range from fifty feet to 8,999 feet above sea level. 49ER Chevrolet, formerly Wilmshurst Chevrolet Co., was established in 1933 by my grandfather and father. The dealership has been in operation for forty-five years with the exception of three years during World War II when all personnel and management enlisted in the service or worked in defense plants. The market served by 49ER Chevrolet has not increased in proportion with most markets in California and the dealership exists on customer satisfaction and repeat business.

RICHARD E. WILMSHURST: I have worked in the automobile business since 1953 when washing and servicing cars was a summer job. I attended Chevrolet Management School in Detroit, Michigan in 1958 and have purchased the ownership of the

dealership from my father (who passed away in 1963), and his partner. I am familiar with all facets of the automobile business, having worked in all departments of the business.

THE NEW VEHICLE WARRANTY SYSTEM: The causation in fact of warranty is the negligence in manufacture or design of a motor vehicle. The manufacturer's express warranty (warranty book supplied to the new vehicle purchaser) is the method of *limiting* the warranty service due the purchaser.

The dealer is the party who must meet the manufacturer's duty to the buyer in fulfilling the warranty, for the new vehicle manufacturer maintains no service shops of its own.

The agreement between the manufacturer and the dealer is known as the franchise agreement and contains the basis for warranty repair by reference to a complex Warranty Procedures Manual. The manual is designed to provide safeguards in audit control so that the manufacturer can review and pay for warranty work with all dealers in the same manner. This purpose is legitimate when the volume and complexity of the warranty *problem* is considered.

However, The Warranty Procedures Manual contains *price fixing* formulas that have escaped the application of the Federal Antitrust laws. In other industries the portion of the manufacturer's pricing of parts have been held to be a violation of Section 1 of the Sherman Act and the method of fixing the price on dealer's labor has been held to violate Section 7 of the Clayton Act. In 1974, while visiting Washington, D.C., I met with attorneys of the Federal Trade Commission and expressed my fears of the antitrust violations by the automobile manufacturers. At that time, I was advised that the budget of the Federal Trade Commission and the Justice Department would not permit an action against a major automobile manufacturer.

Since that time, the legislature of many states has heard the cry from the small automobile dealer and has enacted legislation that would have the same effect as if the Federal Government were to enforce the antitrust laws. The automobile maunfacturers are contesting the State Laws on a case by case basis; Ford and

General Motors have taken the State of Rhode Island[1] in Federal District Court in an effort to maintain their *conspiracy* to fix warranty pricing.

The major automobile manufacturers have fixed warranty compensation paid to dealers below the cost of the dealers doing the work. This effect is accomplished in three ways:

(1) Paying the dealer at a labor rate below that which he charges his retail customers;

(2) Paying the dealer for parts at a price below his cost of handling the parts; and

(3) Establishing flat rate time schedules below the time actually needed to perform the work in a *safe and efficient manner.*

THE EFFECT OF WARRANTY PRICE FIXING ON THE CONSUMER: Dissatisfaction with the retail automobile dealer and the change in purchasing habits from U.S. produced products to that of foreign manufacture.

THE DEALER AND THE CONSUMER: In many instances, the short times and low pay produce a poor quality of work.[2] In many instances, a dealer may not attempt warranty work that he

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[1] *FORD MOTOR COMPANY vs. EUGENE P. PETIT, JR.*, Registrar of Motor Vehicles, Department of Transportation of the State of Rhode Island, and JULIUS C. MICHAELSON, as Attorney General of the State of Rhode Island, Civil Action No. 77-639 (1977).

[2] The Song-Beverly Consumer Warranty Act (Cal. Civ. Code §§ 1790-1795.7 requires every manufacturer of consumer goods to designate authorized service and repair facilities reasonably close to retail outlets in order to carry out the terms of express warranties (Cal. Civ. Code § 1793.2 (a)(1). Apparently as a result of this requirement "(a) handful of large manufacturers dictate the terms of warranty service contracts with thousands of independent repair shops, and the repairman is often forced to perform warranty services below his actual costs" (Senator David Roberti, Press Release No. 49, May 12, 1976). As a result of these subcost contracts, repair shops are apparently forced to cut corners, often times causing them to "turn out shoddy work." (PACIFIC LAW JOURNAL Vol. 9 at pg. 334).

may feel is due the customer when there is a doubt that the manufacturer will pay him. In this instance the consumer may hold the dealer responsible for not making the warranty adjustment that is due.

In a closed circuit telecast at a Chevrolet meeting in San Francisco in 1975 a General Motors' (hereinafter referred to as G.M.) official stated that Chevrolet wanted the dealers to take care of the customer's warranty problem and after the dealer had performed the work, Chevrolet and the dealer could iron out who was going to pay the bill. When a dealer is not sure if he is going to get paid for work, there is a natural hesitancy to take care of the customer.

The manufacturer has used the theory that it is o.k. for the customer to become dissatisfied with the dealer as long as he goes to another dealer to buy their product. In essence, the dealer is used as the scape goat for non-warranty repair.

In some instances, since the dealer is paid below his cost to make warranty repair, and a vehicle is close to being out of the warranty period, the dealer may not make the warranty repair when it is found within the warranty period so that later he may charge the customer at his retail rate after the warranty period has expired. This practice cannot be condoned, however, the causation is the price fixing by the automobile manufacturers.

THE EFFECTS OF PRICE FIXING ON THE DEALER AND THE REPAIR INDUSTRY: When the three factors of low labor rates, no parts profit and short repair times are combined, the manufacturer in some instances has established a price for a particular warranty repair job at one-half of what the retail price would cost. This would mean that a dealer must either do a large volume of retail repairs vs. warranty work at reasonable rates or raise his retail rate to the consumer and in effect pass the cost of the manufacturer's warranty repair on the general public.

MECHANIC'S PAY: The fact that the manufacturer has fixed warranty labor rates at below retail rates and established complex procedures for a dealer to follow in order to have his labor rate increased has kept the non-union mechanic's pay below other fields that require the same technical training. The overall result

is that now there is a shortage of trained mechanics and little reason for young men to enter the trade.

The effect of the pressure by State Laws such as Rhode Island has been that G.M. has now agreed to pay its dealers for warranty repair at their *posted retail labor rate*, however, this change does not go into effect until May 1, 1978, and the dealer must suffer the results of the price fixing until that date.

PRICE FIXING AND FRAUD IN THE DEALER MANUFACTURER RELATIONSHIP: When prices are fixed below a dealers cost of providing a service the stage is set for attempted recapture of losses due to price fixing by the filing of fraudulent warranty claims. The course of conduct promulgated by the automobile manufacturer is cheat and be cheated with the dissatisfied consumer as the by-product. There is little doubt that many automobile dealers and their employees submit fraudulent warranty claims to the autombile manufacturers in an attempt to minimize their losses due to price fixing and denied warranty claims. The manufacturer makes regular audits of dealers' claim files and with regularity charges back many thousands of dollars in both unjustified and justified warranty claims.

The cheat and be cheated atmosphere has been the basis of mass firings of G.M. personnel who cooperated with dealers in cheating G.M. and in another instance where a Chevrolet employee was murdered when he was involved in a warranty audit.

49ER VS. G.M.'s WARRANTY POLICIES: We have advised G.M. by certified letter to Mr. Murphy, Chairman of G.M.'s Board of Directors, that we felt the G.M. policy was unfair and in violation of the criminal anti-trust statutes. We have been personally advised by Mr. Stacy, a vice-president of G.M., that G.M. was in fact above the law, could operate as they pleased and that it was up to anyone what wanted to risk the cost to challenge them.

49ER Chevrolet has enforced their rights to payment for warranty claims in small claims court where they have received numerous judgments that have been promptly paid by G.M. Most other dealers charge off the unpaid claims as a cost of doing business.

RETALIATION BY G.M.: In 1973 the Chevrolet Motor Division charged back in excess of $3,100.00 in warranty claims that had been paid to 49ER Chevrolet for technical reasons such as not being received within 30 days of the work being performed, wanting parts at below the cost billed, and misunderstanding by Chevrolet of work that was done on a sublet basis. We would not acknowledge the charge to our mutual account; however, it was charged back notwithstanding our assertion the claims were proper. Each month thereafter we deducted the $3,100.00 charged back when paying our open account. After a few months we were put on C.O.D. to attempt to force us to pay this unauthorized and improper chargeback. We then put G.M. on C.O.D. on warranty work and the account was thereafter opened again.

However, after that Chevrolet sent four auditors to go through our records and bring our office to a stop by disrupting our business operation; this was stopped by bringing in a T.V. station to videotape G.M.'s harassment. The G.M. auditors left with their hands covering their faces like accused criminals being brought into court for arraignment; we have saved this videotape.

In 1974 about $800.00 of the original $3,100.00 chargeback was credited back after our local court held on several occasions that even if G.M. did not receive a warranty claim at their processing center in Detroit within 30 days that G.M. still had to pay for the warranty work performed.

In August of 1977, G.M. again put 49ER Chevrolet on C.O.D. for all parts purchased as we would not pay the now $1,800.00 chargeback that we denied owing. At present, Chevrolet will not ship us any parts needed to operate our business without the libel of a C.O.D. and the additional costs incurred thereby.

We are shipped on an open account basis all advertising material and material we are forced to buy from G.M. G.M. also has over $9,000.00 as security for our account in what is known as dealer holdback; the holdback is the manufacturer's security that they will never be left with an uncollectable balance on a dealers open account.

We have been told that we will *never* be shipped any parts for our business on an open account basis until we agree to pay the warranty chargeback.

In January of 1978, our shipment of cars and trucks stopped and we had no inventory from which to operate our business. At this time, the Zone had an oversupply of cars and trucks. We wired G.M. and advised them that their acts violated § 11713.2 of the California Vehicle Code, which is a criminal statute and the flow of cars was resumed. The effect of the January shutdown of inventory was a loss of over $3,000.00.

At this point in time, we are still on C.O.D. for parts with a security deposit of $9,000.00 with G.M. and a credit balance on our account each month. (Copies of our Security Account and last months' mutual account statements are enclosed.)

EFFECT OF WARRANTY PRICE FIXING AND IMPROPERLY DENIED CLAIMS ON OUR BUSINESS: Since 49ER Chevrolet is located in an area where it cannot increase its sales volume to compensate for loss on underpaid warranty work, it must attempt to correct an inequitable and illegal system or be forced out of business.

Our service department pays its mechanics on a flat rate basis; in other words, we contract with our mechanics to do a job in the time set forth in an industry approved flat rate manual; this our mechanics accept, however, they cannot cope with the short time schedule G.M. has prepared to pay for warranty work. The effect of the G.M. flat rate manual is that we have lost our mechanics to other fields and cannot attract others to take their places.

G.M. expects us to pay a mechanic for three hours it takes him to do a job that G.M. sets the time operation at one and one-half hours; we cannot operate a business in this manner without overcharging someone to make up for the loss forced upon us by G.M.

We hope that this letter will be of some help in allowing your committee to understand what is happening to the small automobile dealer all over the United States. In 1948 there were over

49,000 retail automobile dealers in the U.S. Today there is somewhere over 24,000.

A dissatisfied consumer is the result of an unjust and illegal system of price fixing. The only reason we are fighting is the fact that our back is up against the wall. Our only alternative is to attempt to correct the illegal warranty practice or become one of those almost 25,000 retail automobile dealers who are no longer in business. Warranty is not the only illness in our business; however, it might be considered the cancer of our trade.

Very truly yours,

Richard E. Wilmshurst
President
49ER CHEVROLET

REW:sl
Encs.

Appendix E

DIVISION OF CONSUMER SERVICES [Letterhead]
Legal Services Unit
1021 O Street, Room A-602
Sacramento, California 95814
Telephone: (916) 445-5126

May 12, 1978

Richard E. Wilmshurst, President
49er CHEVROLET
P.O. Box 65
Angels Camp, CA 95222

Dear Mr. Wilmshurst:

Richard Spohn has asked me to express his and the Department's appreciation of your comments regarding the "flat rate" public hearings.

All your suggestions are interesting and valuable. Some, such as a truly independent flat rate manual, seem unlikely to be implemented due to practical problems.

I am giving serious attention to the issues you have raised regarding violations of Business and Professions Code section 17026 and 17048.5 as well as Cartwright Act violations.

Again, let me thank you for your insightful letter and participation at the Sacramento hearing.

Very truly yours,

/s/ Jeffrey Fine

JEFFREY FINE
Legal Counsel
Legal Services Unit

Appendix F

Chevrolet Motor Division
General Motors Corporation
General Motors Building
Detroit, Michigan 48202

October 23, 1979

Office of the General Sales Manager

49er Chevrolet
P.O. Box 65
Angels Camp, California 95222

Attention: Mr. Richard E. Wilmshurst

Dear Mr. Wilmshurst:

As you know, the Dealer Sales and Service Agreement under which 49er Chevrolet is currently operating as an authorized Chevrolet dealer will expire, according to its terms, on October 31, 1980.

During the past several years, you have repeatedly impugned the honesty, integrity and business practices and ethics of the Chevrolet organization, to the extent of accusing Chevrolet of knowingly flouting state and federal laws. You have even attempted to intimidate individual employes by, among other things, accusing them of deliberate misrepresentation, fraud and criminal misconduct, and by stating to them that they are placing themselves in jeopardy merely by carrying out their job responsibilities. This course of conduct has made it extremely difficult and unpleasant for our employees to deal with you and it has eroded and ultimately destroyed the trust, confidence and respect that is essential to any productive business relationship. For these reasons, Chevrolet Motor Division will not enter into a new Dealer Sales and Service Agreement with 49er Chevrolet following the expiration of the current Agreement.

The purpose of this letter is to give you a year's advance notice of our decision in order to maximize your opportunity to sell your dealership assets or to explore the possibility of obtaining some other motor vehicle franchise. For this reason, we do not intend to

disclose our decision to any third party at this time. In addition, you should be aware that this decision is reviewable at this time pursuant to the provisions of the General Motors Dealer Relations Umpire Plan.

In the event you wish to proceed in accordance with Article IV, Section F of the Dealer Sales and Service Agreement, we will be happy to put you in touch with any qualified candidate who files or has filed an application for a Chevrolet dealership with the Oakland Zone Office. Alternatively, in the event you wish to liquidate the dealership, we are prepared to repurchase eligible items of personal property and to provide other assistance as provided for in Article IV, Sections C and D of the Dealer Agreement. Please notify us if you should want us to assist you in this fashion.

Yours truly,

R. E. Cook
General Sales Manager